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MARITIME INTELLIGENCE SDN BHD v. TAN AH GEK

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
NALLINI PATHMANATHAN FCJ
HARMINDAR SINGH DHALIWAL FCJ
B [CIVIL APPEAL NO: 02(f)-60-10-2020(J)]
22 OCTOBER 2021

LABOUR LAW: *Industrial Court – Jurisdiction – Dismissal of workman – Representations – Whether term 'representations' ties jurisdiction of Industrial*
C *Court to reasons, factors or events operating in mind of employer at time of dismissal – Whether focus of enquiry of Industrial Court premised on matters and events which occurred at time of dismissal – Whether wording of s. 20 of Industrial Relations Act 1967 prescribes or allows overarching survey by Industrial Court of any and all matters both pre and post-dismissal – Whether 'just cause or excuse' only*
D *refer to reason resonating in employer's mind prior to decision to dismiss – Whether subsequent and fresh evidence could be utilised retrospectively to justify termination – Literal and purposive statutory construction of s. 20 – Whether envisages employer seeking to justify termination utilising post-dismissal reasons – Whether Industrial Court has right to enquire into reasons subsequently put up by employer via*
E *pleadings to justify dismissal when such reasons were not given at time of dismissal – Industrial Relations Act 1967, s. 20(1), (3)*

LABOUR LAW: *Employment – Dismissal of workman – Industrial Court – Jurisdiction – Representations – Whether term 'representations' ties jurisdiction of Industrial Court to reasons, factors or events operating in mind of employer at time*
F *of dismissal – Whether focus of enquiry of Industrial Court premised on matters and events which occurred at time of dismissal – Whether wording of s. 20 of Industrial Relations Act 1967 prescribes or allows overarching survey by Industrial Court of any and all matters both pre and post-dismissal – Whether 'just cause or excuse' only refer to reason resonating in employer's mind prior to decision to dismiss – Whether*
G *subsequent and fresh evidence could be utilised retrospectively to justify termination – Literal and purposive statutory construction of s. 20 – Whether envisages employer seeking to justify termination utilising post-dismissal reasons – Whether Industrial Court has right to enquire into reasons subsequently put up by employer via pleadings to justify dismissal when such reasons were not given at time of dismissal – Industrial Relations Act 1967, s. 20(1), (3)*

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The appellant/employer, Maritime Intelligence Sdn Bhd ('company'), owned an educational institution named the Netherlands Maritime Institute Technology ('Institute') where the workman, Tan Ah Gek ('Jenny') commenced employment as Vice President - Services & Registrar ('VPSR').
I At her pre-employment interview, Jenny made available all her certificates and qualifications including the impugned qualification relating to Newport University. At the time, Jenny was not queried on the qualification nor its

accreditation in Malaysia. Subsequently, throughout the course of her employment, no one in the organisation queried her on this issue either. The complaints leading up to her dismissal arose as a consequence of a petition signed by more than half of the employees of the company, alleging that Jenny had abused her power and conducted herself unethically and unprofessionally. The petition was submitted to one Dr Mohd Farhan, a director and shareholder of the company, and he requested Professor Malek, the President and CEO of the Institute, to investigate and report on the allegations. Professor Malek, a personal friend of the workman who had recommended her to the position at the Institute, did not conduct an investigation. Instead, he recommended taking action against four employees who were believed to have initiated the petition on the basis of their purported poor performance. The company then appointed an independent person to investigate the petition, one Haji Arip, a retired director from the Labour Department. Based on Haji Arip's investigation and report, the company was convinced that the workman had committed misconduct and issued a show cause letter. It found Jenny's explanation unacceptable and proceeded to conduct a domestic inquiry, premised on the following charges, *inter alia* (i) unethical behaviour that could tarnish the image of the Institute; and (ii) acting unprofessionally and using derogatory language about the academic staff with the intention of creating a negative perception among other staff members. The domestic inquiry panel found that there was sufficient cogent and convincing evidence to indicate that the allegations against Jenny were established. It furnished written grounds to this effect. The company dismissed Jenny with immediate effect *vide* a letter dated 5 February 2015. Jenny appealed but the company responded stating that in view of the findings of improper conduct, it was untenable for her to continue in her employment with the company. Jenny then filed a representation under s. 20(1) of the Industrial Relations Act 1967 ('Act') seeking reinstatement, leading to a reference to the Industrial Court. The Industrial Court, in finding that the dismissal was without just cause or excuse, held that (i) the domestic inquiry was invalid as the panel was not neutral, independent or impartial; (ii) the Industrial Court heard the matter afresh, allowing the company to establish before it, the reasons and basis for dismissing Jenny; (iii) the company had failed to substantiate the allegations made against Jenny; and (iv) significantly, for the purposes of this appeal, the company raised for the first time in the Industrial Court, in its pleadings, the allegation that the dismissal was justified because Jenny was never qualified for her position from the outset, as her Master's degree was from an unaccredited university in Malaysia. It was the ability and appropriateness of the company to seek to justify its decision to dismiss Jenny by raising two new allegations post-dismissal, and for the first time in the Industrial Court through its pleadings, long after having made the decision to dismiss Jenny, that comprised the subject matter of the instant appeal. The Industrial Court rejected reinstatement as an appropriate remedy but awarded Jenny compensation instead, in the sum of RM288,000. The company sought to

quash the decision of the Industrial Court. The High Court dismissed the company's application for judicial review and held, *inter alia*, that the Industrial Court did not have to consider the submissions about Jenny's lack of qualifications as this was not one of the reasons for her dismissal and that there was no procedural impropriety, irrationality or illegality in the decision-making process of the Industrial Court. Dissatisfied, the company appealed to the Court of Appeal on the sole ground that the Industrial Court wrongly rejected and failed to consider the evidence on Jenny's purported lack of qualifications. The Court of Appeal dismissed the appeal and upheld the Industrial Court's rejection of the company's new allegation. However, the Court of Appeal held that the Industrial Court had the right to inquire into grounds that differed from the reasons for the dismissal, which were subsequently raised by the company in its pleadings, to justify Jenny's dismissal and that the Industrial Court had the discretion whether to consider the new grounds and, if it did, the requisite weight to be attached to the same. The Court of Appeal distinguished the two situations where the company gave no reasons at all for dismissing the workman, and where the company gave some reasons for dismissing the workman but only raised new grounds before the Industrial Court. The Court of Appeal held that in the former situation, it could be concluded that the company elected to justify its dismissal of the workman at the Industrial Court. However, in the latter situation, the Industrial Court ought to be entitled to satisfy itself as to why the new ground of misconduct was not communicated to the workman earlier. By its decision, the Court of Appeal had taken a new and definitive position on post-dismissal allegations in dismissal cases under s. 20 which had neither been articulated nor accepted as the applicable position in law under the Act by the superior appellate courts. However, the reasoning of the Court of Appeal and its conclusions on the law were completely different from the propositions of law advanced by the Industrial Court and affirmed by the High Court, the latter relying on the case of *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd*. The company was granted leave to appeal to the Federal Court on these questions of law (i) whether the Industrial Court has the right to enquire into reasons subsequently put up by the employer *via* pleading to justify the dismissal, even if such reasons were not given at the time of the dismissal ('question 1'); and (ii) whether the Federal Court decision in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* is authority for the proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination ('question 2').

Held (dismissing appeal with costs)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The Act and s. 20 comprise social legislation promulgated by Parliament to ensure that a workman's right to earn a livelihood is not truncated arbitrarily at the will of an employer. Section 20 in particular precludes arbitrary and capricious decisions taken to cease/

halt a person's employment, because it is recognised that the right to earn a livelihood is a fundamental liberty and entitlement, that deserves protection. As a social legislation, it is incumbent upon this court, when construing its provisions to give the statutory provisions a construction which would assist to achieve the object of the Act. The evolution of industrial law in this jurisdiction and many decisions of this court have emphasised the importance, significance and relevance of having regard to the fact doctrine of social justice. Section 20 of the Act provides such protection. Where a 'workman' or employee considers that he has been dismissed 'without just cause or excuse' by his employer, he may make representations as outlined in the Act, seeking the remedy of reinstatement to his former employment. (paras 40 & 41)

(2) Section 20(1) makes it clear that representations *ie,* a grievance may be lodged, based on the workman's own subjective view that his employment has been terminated without a well-grounded, impartial and reasonable basis. This affords the workman an immediate avenue of redress and access to justice. Section 20(3) provides for the representations made by the workman in s. 20(1) to comprise the subject matter of an award of the Industrial Court. The representations made by the workman refer to the complaint of a dismissal without just cause or excuse. This in turn means that the Industrial Court is required by law to investigate and adjudicate on the representations by the workman of a dismissal without just cause or excuse, concluding in an award. To that extent, the jurisdiction of the Industrial Court, which is an industrial adjudicatory tribunal created by statute, is prescribed and circumscribed by s. 20(3) of the Act. That jurisdiction is solely to ascertain whether the representations of the workman of dismissal without just cause or excuse, has been made out. (paras 42, 44 & 45)

(3) By virtue of the clear statutory content of s. 20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse. Those representations are made by the workman at the time of his dismissal, for reasons which he feels are without any reasoned basis or for reasons that are insufficient to warrant a dismissal. The focus of the enquiry of the Industrial Court under s. 20(3) of the Act, is therefore premised on matters and events as they occurred at the time of the dismissal. The reasons operating in the mind of the employer, which preceded the decision to terminate, and resulted in the decision to terminate, comprise the matters to be considered and adjudicated upon by the Industrial Court under s. 20(3). By way of elaboration of this point, specific factors, events or reasons would have operated on the employer's mind, prior to the employer deciding to terminate the

workman's services. It is those reasons, factors or events which comprise the basis for the dismissal. The workman makes his representation or complaint of dismissal without just cause or excuse based on those reasons, factors or events only under s. 20(1). It therefore follows that the representations based on those limited reasons factors or events only, can comprise the basis for assessment and adjudication by the Industrial Court under s. 20(3). The term 'representations' therefore ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of dismissal resulting in the representation. (paras 46-48)

(4) There is no provision for the Industrial Court to consider matters outside of the representation by the workman, under s. 20(3). Matters outside of the representation would include matters which were not operative in the employer's mind when the decision to dismiss was taken, but which the employer chooses to put forward post-dismissal at a subsequent stage in the Industrial Court, to justify the decision to dismiss the workman*, ex post facto*. The very specific wording of s. 20 does not prescribe or allow an overarching survey by the Industrial Court of any and all matters both pre and post-dismissal, in an effort to ascertain whether the workman's representations are made out. It is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s. 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman (paras 50 & 51)

(5) Any such 'just cause or excuse' can only refer to the reason resonating in the employer's mind, prior to, or preceding the decision to dismiss. Those words do not envisage the investigation or contemplation of matters or reasons that the employer discovers subsequently or which operate on the employer's mind post-dismissal. These subsequent matters may well go to the issue of the moulding of the relevant relief such as contributory conduct, or comprise basis to refuse reinstatement and reduce or refuse compensation *in lieu.* However, such subsequent and fresh evidence could not be utilised retrospectively to justify a termination which was not effected for those reasons or on that basis. This is because such 'cause' did not

operate on the employer's mind at the material time. Therefore, both literal and purposive statutory construction of s. 20 do not envisage the employer seeking to justify the termination utilising post-dismissal reasons. (paras 53-55)

(6) A literal and purposive statutory construction of the provisions of s. 20 clearly support the legal position that the Industrial Court is statutorily circumscribed in its jurisdiction to examine, adjudicate and hand down an award as to whether the dismissal was with or without just cause or excuse premised on matters operating in the mind of the employer at the time of the dismissal. As such, the underlying matters relied upon as comprising 'just cause or excuse' cannot and do not refer to matters discovered or chosen to be utilised post-dismissal, in order to justify the dismissal at the Industrial Court. (para 57)

(7) The net effect of allowing the industrial tribunals to adopt a reading of their own choice in relation to a s. 20 representation is to undermine the very purpose and rationale of the legislation designed to protect a workman. It gives the employer the opportunity to re-think and add to the original reasons for the dismissal, in an effort to shore up its case. The employer is endowed with the means and capacity to so do, in the long interval between the lodging of a representation and the final hearing in the Industrial Court. That is not the purpose of the Act which is to give a quick and effective remedy to a workman who requires employment as a means of livelihood. In point of fact, as is well known, the remedy is supposed to be effected within 30 days. However, with the advent of sophisticated litigation in the Industrial Court, the dream of access to justice for a workman has long since become somewhat of a mirage. However, what is clear is that the legislation as crafted in s. 20 of the Act cannot be stymied or weakened by unwarranted and invalid extensions to the purpose of s. 20. (paras 99 & 100)

(8) Where an employer fails to hold an inquiry, or an inquiry is found to be defective, it is open to the employer to establish afresh at the inquiry before the Industrial Court, that the dismissal was indeed with just cause or excuse. The employer is at liberty to establish the basis for the decision to terminate the workman. The employer is accorded a further opportunity to justify the reasons for the dismissal despite not having held an inquiry or by reason of having held an invalid inquiry. It is not, however, a license for the employer to introduce fresh matters and events or occurrences that have subsequently appeared to the employer to provide good basis to justify the dismissal. It remains the position that the reasons advanced in the Industrial Court inquiry should be the reasons operating in the mind of the employer at or immediately prior to the dismissal. The employer is entitled to establish just cause or excuse in relation to the dismissal, but such

A cause or excuse is circumscribed to the material time. That material time is the period relating to and immediately prior to the dismissal. It does not extend to other reasons occurring to the employer subsequently at the Industrial Court inquiry stage. (paras 104, 106 & 107)

B **(9)** It is well-settled from *Goon Kwee Phoy* onwards that the workman's claim of a dismissal without just cause or excuse under s. 20 should be tried on the cause of action, or circumstances apprehending at the time of the dismissal when the representations were made. However, that does not mean that events after institution of the representations C cannot be considered at all. In a case where there are compelling new facts of for example breach of trust or theft, discovered post-dismissal, it is open to the employer to adduce such evidence in relation to the remedy to be afforded to the workman. It would be a formidable basis to counter a claim for reinstatement, and may well be sufficient for the D Industrial Court to conclude that no compensation *in lieu* of reinstatement ought to be allowed either. In point of fact, it is the duty of the Industrial Court under s. 30 to consider the subsequent facts and circumstances and mould the relief accordingly. It might conclude that the relief has become inappropriate and determine the correct relief to E achieve complete justice between the parties. While it therefore may go towards the issue of the remedy to be awarded, it does not go to the basis or reason for the dismissal, simply because it was not known at that particular time and could not have operated on the employer's mind. As such, the workman was not dismissed for such misconduct, but for some other reason. That other reason comprises the basis for F the workman's representation and it is the representation that circumscribes the Industrial Court's function and obligation under s. 20(3). (paras 110-112)

(10) The Court of Appeal erred in relying wholly on the inadequately G reasoned decisions of an inferior tribunal, the Industrial Court in preference to the clear words of this court in *Goon Kwee Phoy*. It also did not give any, or any adequate consideration to, or statutorily interpret the express terms of s. 20 of the Act. (para 113)

(11) As for the questions of law raised, as to whether the Industrial Court H has the right to enquire into reasons subsequently advanced by the employer *via* pleadings at the hearing stage of the inquiry before the Industrial Court, to justify the dismissal, even if such reasons were not the reasons advanced at the time of the dismissal, the answer to question 1 was answered in the negative. As for question 2, as to I whether the Federal Court decision in *Goon Kwee Phoy* is the authority for the proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination, this court declined to answer this question. (para 114)

Bahasa Melayu *Headnotes*

Perayu/majikan, Maritime Intelligence Sdn Bhd ('syarikat') memiliki sebuah institusi pendidikan bernama Netherlands Maritime Institute Technology ('Institusi') di mana pekerja, Tan Ah Gek ('Jenny') memulakan pekerjaan sebagai Naib Presiden – Perkhidmatan & Pendaftar ('VPSR'). Semasa wawancara pra-pekerjaannya, Jenny mengemukakan semua sijil dan kelayakannya termasuk kelayakan yang berkaitan dengan Universiti Newport. Pada masa itu, Jenny tidak ditanya tentang kelayakan atau akreditasinya di Malaysia. Selepas itu, sepanjang pekerjaannya, tiada seorang pun di organisasi yang membangkitkan isu ini. Aduan-aduan yang membawa pada pemecatannya timbul akibat petisyen yang ditandatangani oleh lebih separuh pekerja syarikat itu, yang mendakwa bahawa Jenny telah menyalahgunakan kuasanya dan berkelakukan tidak beretika dan tidak profesional. Petisyen itu diserahkan kepada satu Dr Mohd Farhan, seorang pengarah dan pemegang saham syarikat itu, dan dia meminta Profesor Malek, Presiden dan CEO Institusi tersebut untuk menyiasat dan melaporkan tuduhan tersebut. Profesor Malek, rakan peribadi pekerja yang telah mengesyorkannya ke jawatan di Institusi ini, tidak menjalankan siasatan. Sebaliknya, dia mengesyorkan agar diambil tindakan terhadap empat pekerja yang dipercayai telah memulakan petisyen tersebut berdasarkan prestasi buruk mereka. Syarikat kemudian melantik orang bebas untuk menyiasat petisyen itu, satu Haji Arip, seorang pengarah yang telah bersara dari Jabatan Buruh. Berdasarkan siasatan dan laporan Haji Arip, syarikat yakin bahawa pekerja tersebut telah melakukan kesalahan dan mengeluarkan surat tunjuk sebab. Syarikat mendapati penjelasan Jenny tidak dapat diterima dan terus melakukan satu inkuiri domestik, berdasarkan dakwaan-dakwaan berikut, antara lain; (i) tingkah laku tidak beretika yang boleh merosakkan imej Institusi; dan (ii) bertindak secara tidak profesional dan menggunakan bahasa kasar terhadap staf akademik dengan tujuan mewujudkan persepsi negatif dalam kalangan kakitangan lain. Panel inkuiri domestik mendapati terdapat bukti yang cukup mantap dan meyakinkan untuk menunjukkan tuduhan terhadap Jenny telah dibuktikan. Satu alasan bertulis telah diberikan untuk tujuan ini. Syarikat memecat Jenny dengan segera melalui sepucuk surat bertarikh 5 Februari 2015. Jenny mengemukakan rayuan tetapi syarikat menjawab dengan menyatakan bahawa memandangkan penemuan tingkah laku yang tidak betul, untuk Jenny terus bekerja dengan syarikat itu tidak boleh dipertahankan. Jenny kemudian memfailkan representasi bawah s. 20(1) Akta Perhubungan Perusahaan 1967 ('Akta') yang meminta pengembalian semula kedudukan jawatan, yang membawa pada rujukan ke Mahkamah Perusahaan. Mahkamah Perusahaan, dalam mendapati pemecatan itu tanpa sebab atau alasan yang adil, memutuskan; (i) inkuiri domestik tidak sah kerana panelnya tidak berkecuali, tidak bebas atau berat sebelah; (ii) Mahkamah Perusahaan mendengar perkara itu lagi, membenarkan syarikat membuktikan sebelum itu, alasan dan asas untuk memecat Jenny (iii) syarikat gagal membuktikan

A tuduhan yang dibuat terhadap Jenny; dan (iv) dengan ketara, untuk tujuan rayuan ini, syarikat itu membangkitkan buat pertama kalinya di Mahkamah Perusahaan, dalam plidingnya, bahawa pemecatan adalah berjustifikasi kerana Jenny tidak pernah memenuhi syarat untuk jawatannya sejak awal lagi, kerana ijazah Sarjananya adalah dari universiti yang tidak bertauliah di B Malaysia. Adalah kemampuan dan kesesuaian syarikat untuk menuntut justifikasi keputusannya untuk memecat Jenny dengan mengemukakan dua tuduhan baharu setelah pemecatan, dan untuk pertama kalinya di Mahkamah Perusahaan melalui pengakuannya, setelah sekian lama membuat keputusan untuk memecat Jenny, yang merangkumi pokok rayuan ini. Mahkamah C Perusahaan menolak pengembalian semula kedudukan jawatan sebagai remedi yang sesuai tetapi memberikan pampasan kepada Jenny sebagai gantinya, dalam jumlah RM288,000. Syarikat berusaha untuk membatalkan keputusan Mahkamah Perusahaan. Mahkamah Tinggi menolak permohonan syarikat untuk semakan kehakiman dan memutuskan, antara lain, bahawa D Mahkamah Perusahaan tidak perlu mempertimbangkan hujahan-hujahan tentang kekurangan kelayakan Jenny kerana ini bukan alasan pemecatannya dan bahawa tiada ketakaturan prosedur, ketakrasionalan atau ketaksahan dalam proses membuat keputusan oleh Mahkamah Perusahaan. Tidak berpuas hati, syarikat merayu ke Mahkamah Rayuan dengan alasan bahawa Mahkamah Perusahaan terkhilaf apabila menolak dan gagal mempertimbangkan E keterangan mengenai kekurangan kelayakan Jenny. Mahkamah Rayuan menolak rayuan tersebut dan membenarkan penolakan Mahkamah Perusahaan terhadap dakwaan baharu syarikat itu. Walau bagaimanapun, Mahkamah Rayuan berpendapat bahawa Mahkamah Perusahaan mempunyai hak untuk meneliti alasan yang berbeza dengan alasan pemecatan tersebut, F yang dikemukakan kemudian oleh syarikat dalam permohonannya, untuk menjustifikasikan pemecatan Jenny dan bahawa Mahkamah Perusahaan mempunyai budi bicara sama ada untuk mempertimbangkan alasan baharu dan jika ini berlaku, keberatan yang perlu dilampirkan padanya. Mahkamah Rayuan membezakan dua situasi apabila syarikat sama sekali tidak G memberikan alasan untuk memecat pekerja tersebut, dan apabila syarikat memberikan beberapa alasan untuk memecat pekerja tersebut tetapi hanya mengemukakan alasan baharu di Mahkamah Perusahaan. Mahkamah Rayuan berpendapat bahawa dalam situasi pertama, dapat disimpulkan bahawa syarikat memilih untuk menjustifikasikan pemecatan pekerja itu di Mahkamah Perusahaan. Namun, dalam situasi kemudiannya, Mahkamah H Perusahaan berhak untuk memuaskan dirinya sendiri mengapa alasan salah laku baharu tidak disampaikan kepada pekerja sebelumnya. Melalui keputusannya, Mahkamah Rayuan mengambil kedudukan baharu tentang tuduhan-tuduhan selepas kes pemecatan bawah s. 20 yang tidak diartikulasikan atau diterima sebagai kedudukan yang berlaku dalam undang- I undang bawah Akta oleh mahkamah-mahkamah rayuan atasan. Walau bagaimanapun, alasan Mahkamah Rayuan dan kesimpulannya tentang undang-undang sama sekali berbeza dengan cadangan undang-undang yang

dikemukakan oleh Mahkamah Perusahaan dan disahkan oleh Mahkamah Tinggi, yang terakhir bergantung pada kes *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd*. Syarikat diberi kebenaran untuk mengemukakan rayuan kepada Mahkamah Persekutuan tentang persoalan undang-undang ini (i) adakah Mahkamah Perusahaan mempunyai hak untuk menangani alasan yang kemudiannya dikemukakan oleh majikan melalui permohonan untuk membenarkan pemecatan tersebut, walaupun alasan tersebut tidak diberikan pada masa pemecatan ('soalan 1'); dan (ii) adakah keputusan Mahkamah Persekutuan dalam *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* adalah autoriti untuk menyatakan bahawa majikan hanya terikat dengan alasan pemecatan yang dinyatakan dalam surat penamatan ('soalan 2').

Diputuskan (menolak rayuan dengan kos)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Akta dan s. 20 merangkumi undang-undang sosial yang diumumkan oleh Parlimen untuk memastikan bahawa hak pekerja mencari nafkah tidak ditamatkan secara sewenang-wenangnya atas kehendak majikan. Seksyen 20 secara khusus menghalang keputusan sewenang-wenang dan berubah-ubah yang diambil untuk menghentikan/menamatkan pekerjaan seseorang, kerana diakui bahawa hak untuk mencari nafkah adalah kebebasan dan hak asasi, yang layak mendapat perlindungan. Sebagai perundangan sosial, adalah kewajipan mahkamah ini, ketika menyusun peruntukannya untuk memberikan peruntukan undang-undang pembinaan yang akan membantu mencapai objek Akta. Evolusi undang-undang perusahaan dalam bidang kuasa ini dan kebanyakan keputusan mahkamah ini telah menekankan pentingnya, kepentingan dan relevannya dengan memperhatikan doktrin fakta keadilan sosial. Seksyen 20 Akta memberikan perlindungan tersebut. Sekiranya seorang 'pekerja' menganggap bahawa dia telah diberhentikan 'tanpa sebab atau alasan yang adil' oleh majikannya, dia berhak menuntut remedi seperti yang digariskan dalam Akta, untuk menuntut remedi pengembalian semula kedudukan jawatannya.

(2) Seksyen 20(1) menjelaskan bahawa representasi iaitu rungutan boleh dikemukakan, berdasarkan pandangan subjektif pekerja itu sendiri bahawa pekerjaannya telah ditamatkan tanpa asas yang kukuh, berat sebelah dan tidak munasabah. Ini memberi pekerja jalan penyelesaian segera dan akses kepada keadilan. Seksyen 20(3) memperuntukkan representasi yang dibuat oleh pekerja dalam s. 20(1) agar merangkumi subjek perkara award Mahkamah Perusahaan. Representasi yang dibuat oleh pekerja merujuk pada aduan pemecatan tanpa sebab atau alasan yang adil. Ini seterusnya bermakna bahawa Mahkamah Perusahaan dikehendaki oleh undang-undang untuk menyiasat dan menghakimi representasi oleh pekerja tentang pemecatan tanpa sebab atau alasan yang adil, dan membuat kesimpulan dalam satu award.

Setakat itu, bidang kuasa Mahkamah Perusahaan, yang merupakan tribunal adjudikasi perusahaan yang diwujudkan oleh statut, ditetapkan dan dihadkan oleh s. 20(3) Akta. Bidang kuasa itu adalah semata-mata untuk memastikan sama ada representasi pekerja bahawa pemecatannya tanpa sebab atau alasan yang adil, telah dibuktikan.

(3) Berdasarkan kandungan statutori jelas s. 20(3), fungsi Mahkamah Perusahaan terkait erat dengan representasi-representasi pekerja yang dipecat tanpa sebab atau alasan. Representasi-representasi tersebut dibuat oleh pekerja pada saat pemecatannya, dengan alasan yang dia rasa adalah tanpa asas yang beralasan atau dengan alasan yang tidak mencukupi untuk mewajarkan pemecatan. Fokus inkuiri Mahkamah Perusahaan bawah s. 20(3) Akta, oleh itu, berdasarkan pada perkara dan peristiwa seperti yang berlaku pada masa pemecatan. Alasan-alasan yang beroperasi dalam minda majikan, yang mendahului keputusan untuk memberhentikan, dan mengakibatkan keputusan untuk memberhentikan, terdiri dari hal-hal yang harus dipertimbangkan dan diadili oleh Mahkamah Perusahaan bawah s. 20(3). Dengan penjelasan mengenai perkara ini, faktor, peristiwa atau alasan tertentu akan berjalan di fikiran majikan, sebelum majikan memutuskan untuk menghentikan perkhidmatan pekerja. Sebab, faktor atau peristiwa itulah yang menjadi asas pemecatan tersebut. Pekerja membuat representasi atau aduan pemecatannya tanpa sebab atau alasan yang adil berdasarkan alasan, faktor atau peristiwa tersebut hanya bawah s. 20(1). Oleh itu, representasi-representasi berdasarkan faktor atau peristiwa alasan yang terhad itu sahaja, dapat menjadi asas penilaian dan pengadilan oleh Mahkamah Perusahaan bawah s. 20(3). Oleh itu, istilah 'representasi' mengikat bidang kuasa Mahkamah Perusahaan dengan alasan, faktor atau peristiwa yang beroperasi dalam fikiran majikan pada masa pemecatan yang mengakibatkan representasi.

(4) Tiada peruntukan untuk Mahkamah Perusahaan mempertimbangkan hal-hal di luar representasi oleh pekerja, bawah s. 20(3). Perkara-perkara di luar representasi akan merangkumi perkara-perkara yang tidak dapat dikendalikan oleh pihak majikan ketika keputusan untuk diberhentikan diambil, tetapi yang dipilih oleh majikan untuk mengemukakan selepas pemecatan pada peringkat berikutnya di Mahkamah Perusahaan, untuk menjustifikasikan keputusan memecat pekerja, *ex post facto*. Perkataan yang sangat spesifik s. 20 tidak menetapkan atau membenarkan tinjauan menyeluruh oleh Mahkamah Perusahaan mengenai semua dan segala perkara sebelum dan selepas pemecatan, dalam usaha untuk memastikan sama ada representasi pekerja dibuktikan. Ini adalah fungsi yang ditetapkan oleh Mahkamah Perusahaan untuk memeriksa, menyiasat representasi pekerja dan kemudian menyerahkan award bawah s. 20(3). Bukan tugas Mahkamah Perusahaan untuk memutuskan sebaliknya daripada yang ditetapkan oleh Akta. Akta ini secara tersirat menetapkan penyiasatan

terhadap fakta dan peristiwa dan alasan pada saat dan/atau masa pemecatan. Tiada peruntukan dalam Akta untuk tribunal perusahaan memulai tinjauan yang jauh untuk memastikan sama ada perkara-perkara yang telah dijumpai oleh majikan kemudian dan tidak diserahkan kepada pekerja, dibenarkan untuk memecat pekerja.

(5) Apa-apa 'sebab atau alasan yang adil' hanya dapat merujuk pada alasan yang bergema di minda majikan, sebelum keputusan untuk menamatkan. Kata-kata itu tidak membayangkan penyiasatan atau pertimbangan perkara atau sebab yang dijumpai oleh majikan kemudian atau yang beroperasi dalam fikiran majikan selepas pemecatan. Perkara-perkara berikutnya mungkin berkaitan dengan acuan remedi yang relevan seperti sumbangan tingkah laku, atau merangkumi asas untuk menolak pengembalian semula kedudukan jawatan dan mengurangkan atau menolak pampasan sebagai ganti. Tetapi keterangan baharu dan berikutnya tidak dapat digunakan secara retrospektif untuk membenarkan penamatan yang tidak dilakukan atas sebab-sebab tersebut atau atas dasar itu. Ini kerana 'sebab' seperti itu tidak beroperasi dalam fikiran majikan pada waktu material. Oleh itu, kedua-dua konstruksi berkanun literal dan bertujuan s. 20 tidak membayangkan majikan berusaha untuk menjustifikasikan penamatan tersebut dengan menggunakan alasan-alasan selepas pemecatan.

(6) Konstruksi statutori literal dan bertujuan peruntukan-peruntukan s. 20 dengan jelas menyokong kedudukan undang-undang yang diperiksa oleh Mahkamah Perusahaan dalam bidang kuasa untuk memeriksa, mengadili dan memberikan award sama ada pemecatan itu dengan atau tanpa sebab atau alasan yang adil yang dibuat berdasarkan perkara-perkara yang beroperasi dalam fikiran majikan pada masa pemecatan. Oleh itu, perkara-perkara yang dirujuk yang terdiri daripada 'sebab atau alasan yang adil' tidak boleh dan tidak merujuk kepada perkara-perkara yang ditemui atau dipilih untuk digunakan setelah pemecatan, untuk menjustifikasikan pemecatan di Mahkamah Perusahaan.

(7) Kesan membenarkan tribunal perusahaan menggunakan pembacaan pilihan mereka sendiri berkaitan dengan representasi s. 20 adalah untuk melemahkan tujuan dan alasan perundangan yang dirancang untuk melindungi pekerja. Ini memberi peluang kepada majikan untuk memikirkan kembali dan menambahkan alasan asal pemecatan tersebut, dalam usaha untuk menyelesaikan kesnya. Majikan diberikan kemampuan dan kapasiti untuk melakukannya, dalam tempoh waktu yang panjang antara penyerahan representasi dan perbicaraan muktamad di Mahkamah Perusahaan. Itu bukan tujuan Akta yang memberi remedi yang pantas dan efektif kepada pekerja yang memerlukan pekerjaan sebagai sarana penghidupan. Sebenarnya, seperti yang diketahui umum, remedi ini seharusnya dilakukan dalam

masa 30 hari. Namun, dengan munculnya proses pengadilan yang canggih di Mahkamah Perusahaan, impian untuk mendapatkan keadilan bagi seorang pekerja telah lama menjadi fatamorgana. Tetapi yang jelas adalah perundangan seperti yang dibuat dalam s. 20 Akta tidak boleh disekat atau dilemahkan oleh lanjutan yang tidak beralasan dan tidak sah untuk tujuan s. 20.

(8) Sekiranya majikan gagal melaksanakan inkuiri, atau inkuiri didapati cacat, adalah terbuka bagi majikan untuk membuktikan lagi siasatan di hadapan Mahkamah Perusahaan, bahawa pemecatan itu memang dengan sebab atau alasan yang adil. Majikan bebas untuk menetapkan asas keputusan untuk memberhentikan pekerja. Majikan diberi kebebasan lanjut untuk membuktikan alasan pemecatan tersebut walaupun tidak melakukan inkuiri atau dengan alasan telah melakukan inkuiri yang tidak sah. Namun, ini bukan lesen untuk majikan memperkenalkan perkara dan peristiwa atau kejadian baharu yang kemudian muncul kepada majikan untuk memberikan asas yang baik untuk menjustifikasikan pemecatan tersebut. Tetap menjadi kedudukan kekal bahawa alasan-alasan yang dikemukakan dalam inkuiri Mahkamah Perusahaan adalah alasan yang beroperasi dalam fikiran majikan pada atau tepat sebelum pemecatan. Majikan berhak untuk menetapkan sebab atau alasan yang adil berkaitan dengan pemecatan tersebut, tetapi sebab atau alasan tersebut terhad pada waktu material. Masa material itu adalah tempoh yang berkaitan dan tepat sebelum pemecatan. Ini tidak merangkumi sebab-sebab lain yang kemudiannya berlaku kepada majikan pada peringkat inkuiri Mahkamah Perusahaan.

(9) Adalah ditetapkan dalam kes *Goon Kwee Phoy* dan seterusnya, tuntutan pekerja untuk pemecatan tanpa sebab atau alasan yang adil di bawah s. 20 harus diadili atas sebab tindakan, atau keadaan yang berlaku pada saat pemecatan ketika representasi dibuat. Namun, ini tidak bermaksud bahawa peristiwa yang berlaku setelah representasi dimulakan tidak dapat dipertimbangkan sama sekali. Dalam kes apabila terdapat fakta baharu yang menarik seperti pelanggaran kepercayaan atau pencurian, yang ditemui selepas pemecatan, terbuka kepada majikan untuk menambahkan bukti tersebut berkaitan dengan remedi yang akan diberikan kepada pekerja. Ini akan menjadi asas yang hebat untuk mengatasi tuntutan pengembalian semula kedudukan jawatan, dan mungkin cukup untuk Mahkamah Perusahaan menyimpulkan bahawa tiada pampasan sebagai ganti pengembalian semula kedudukan jawatan yang dibenarkan. Sebenarnya, adalah tugas Mahkamah Perusahaan bawah s. 30 untuk mempertimbangkan fakta dan keadaan seterusnya dan membentuk relief dengan sewajarnya. Ini mungkin mencapai kesimpulan bahawa relief menjadi tidak wajar dan menentukan relief yang betul untuk mencapai keadilan sepenuhnya

untuk kedua belah pihak. Walaupun ini mungkin menuju ke arah isu remedi yang akan diawardkan, ini tidak menjadi asas atau alasan pemecatan tersebut, hanya kerana ini tidak diketahui pada waktu itu dan tidak beroperasi di fikiran majikan. Oleh itu, pekerja tidak diberhentikan kerana kesalahan tersebut, tetapi atas sebab lain. Sebab lain itu merangkumi asas representasi pekerja dan representasi inilah yang menguraikan fungsi dan kewajipan Mahkamah Perusahaan bawah s. 20(3).

(10) Mahkamah Rayuan terkhilaf apabila bergantung sepenuhnya pada keputusan yang tidak beralasan daripada tribunal rendah, Mahkamah Perusahaan dan mengutamakannya daripada kata-kata yang jelas dari mahkamah ini dalam kes *Goon Kwee Phoy*. Ini juga tidak memberikan pertimbangan yang memadai, atau secara sah untuk mentafsirkan syarat-syarat yang dinyatakan dalam s. 20 Akta.

(11) Berkenaan persoalan undang-undang yang dibangkitkan, iaitu sama ada Mahkamah Perusahaan memiliki hak untuk bertanyakan alasan yang kemudiannya dikemukakan oleh majikan melalui permohonan pada tahap pendengaran inkuiri di hadapan Mahkamah Perusahaan untuk membenarkan pemecatan, walaupun alasan seperti itu bukan alasan yang dikemukakan pada masa pemecatan, jawapan untuk soalan 1 dijawab secara negatif. Bagi soalan 2, iaitu sama ada keputusan Mahkamah Persekutuan dalam kes *Goon Kwee Phoy* adalah autoriti untuk menyatakan bahawa majikan hanya terikat dengan alasan pemecatan yang dinyatakan dalam surat penamatan, mahkamah ini menolak untuk menjawab soalan ini.

Case(s) referred to:

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 4 CLJ 775 FC ***(refd)***

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Galift (M) Sdn Bhd v. Tay Keng Lock [1993] 2 ILR 169 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd [1981] 1 LNS 30 FC ***(refd)***

Mohd Muhayadin Rani v. RM Otomobil Bhd [2012] 1 ILR 129 ***(refd)***

National Land Finance Co-operative Society Ltd v. Raman s/o Perumal Thevar [1993] 1 ILR 390 ***(refd)***

Raja Nazim Raja Nazuddin v. Padu Corporation [2019] 2 ILR 388 ***(refd)***

Selva Rani Sinnathamby v. Concorde Hotel Kuala Lumpur [2014] 3 ILR 658 ***(refd)***

Sugunasegari P S Suppiah v. SAP Malaysia Sdn Bhd [2011] 2 ILR 629 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Time Magazine Service Sdn Bhd v. Ganesan R S Ramasamy [1994] 1 ILR 114 ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(1), 135
Industrial Relations Act 1967, ss. 20(1), (3), 30, 33A

For the appellant - Kanarasan Ghandinesen & Malathi Natarajan; M/s Ghandi
For the respondent - Wong Boon Chong; M/s Gulam & Wong

[Editor's note: For the Court of Appeal judgment, please see Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2020] 1 LNS 2374 (affirmed); For the High Court judgment, please see [2019] 1 LNS 1130 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] The appeal before us turns on one aspect of unfair dismissal law. In this jurisdiction, the remedy for unfair dismissal is codified, *inter alia*, in s. 20 of the Industrial Relations Act 1967 ("the Act"). The focal point of the appeal turns on whether the Industrial Court, in the exercise of its statutory function to adjudicate on a representation of dismissal without just cause or excuse under s. 20 of the Act, may consider matters or issues which did not comprise basis/reason for the dismissal when the employer made the decision to dismiss, but which the employer seeks to put forward post-dismissal, in the Industrial Court, to justify its earlier decision to dismiss the workman.

[2] This issue is of significance as it touches on the scope and ambit of:

(i) The Industrial Court's powers and jurisdiction under s. 20; and

(ii) A workman's right to be heard in relation to the reasons made known to him as warranting his dismissal at the time of such dismissal.

[3] The following questions were referred to us:

(i) Whether the Industrial Court has the right to enquire into reasons subsequently put up by the employer *via* pleading to justify the dismissal, even if such reasons were not given at the time of the dismissal.

(ii) Whether the Federal Court decision in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 is authority for the proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination.

[4] On 22 June 2021, we dismissed the appeal by the employer seeking to rely on post-dismissal matters which were raised for the first time before the Industrial Court. In dismissing the appeal, we indicated that we were guided by the rationale behind the Act and the principles of natural justice. We now give our full reasons for reaching that conclusion.

Background

[5] In the instant appeal, the appellant, Maritime Intelligence Sdn Bhd is the employer, who for ease of reference will be referred to as the company in the rest of this judgment. The workman, Tan Ah Gek aka Jenny will be referred to as "Jenny".

[6] The company owns an educational institution named the Netherlands Maritime Institute of Technology ("the Institute"), where the workman commenced employment on 17 March 2014 as the Vice President - Services & Registrar ("VPSR").

[7] At her pre-employment interview which was conducted by a panel comprising the President of the Institute and several directors of the company, the workman made available all her certificates and qualifications including the impugned qualification relating to Newport University. At that time, Jenny was not queried on the qualification nor its accreditation in Malaysia. In short, her qualifications were accepted as fully disclosed by the workman. Subsequently, throughout the course of her employment, no one in the organisation queried her on this issue either.

[8] The complaints leading up to her dismissal arose as a consequence of a petition signed by more than half of the employees of the company, alleging that Jenny had abused her power and conducted herself unethically and unprofessionally. The petition was submitted to one Dr Mohd Farhan, a director and shareholder of the company sometime in mid-November 2014. He requested Professor Malek, the President and CEO of the Institute to investigate and report on the allegations.

[9] Professor Malek, who was a personal friend of the workman and had recommended her to the position at the Institute, did not conduct an investigation. Instead, he recommended taking action against four employees who were believed to have initiated the petition on the basis of their purported poor performance.

[10] The company then appointed an independent person to investigate the petition, one Haji Arip, a retired director from the Labour Department (COW6). Based on Haji Arip's investigation and report, the company was convinced that the workman had committed misconduct and issued a show cause letter on 6 January 2015. It found Jenny's explanation unacceptable and proceeded to conduct a domestic inquiry, premised on the following charges:

(i) belittling and undermining the authority of Dr Mohd Farhan, the director of the company that owned the Institute;

(ii) unethical behaviour that could tarnish the image of the Institute (screaming loudly enough to be heard on other floors, threatening one

of the signatories to the petition against her, improperly managing the exams unit under her direct supervision and matters under her portfolio, student affairs);

(iii) humiliating the tea lady as well as acting unprofessionally and unethically; and

(iv) using derogatory language about the academic staff with the intention of creating a negative perception among other staff members.

[11] The domestic inquiry panel found that there was sufficient cogent and convincing evidence to indicate that the allegations against Jenny were established. It furnished written grounds to this effect.

[12] The company dismissed Jenny with immediate effect *vide* letter dated 5 February 2015. Jenny appealed but the company responded stating that in view of the findings of improper conduct, it was untenable for her to continue in her employment with the company.

[13] Jenny then filed a representation under s. 20(1) seeking reinstatement, leading to a reference to the Industrial Court.

Decision Of The Courts Below

[14] The Industrial Court found that the dismissal was without just cause and excuse. Both the High Court on judicial review and the Court of Appeal concurred with the final outcome, although their reasoning differed.

The Industrial Court

[15] *Vide* Award No. 8 of Year 2018, the Industrial Court concluded that the dismissal was without just cause or excuse. In its grounds, it held *inter alia* that:

(i) the domestic inquiry was invalid as the panel was not neutral, independent or impartial. The principles of natural justice had been contravened;

(ii) applying *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39; (*Dreamland*), the Industrial Court heard the matter afresh, allowing the company to establish before it, the reasons and basis for deciding to dismiss Jenny;

(iii) having heard the matter afresh, the Industrial Court concluded that the company had failed to substantiate the four allegations made against Jenny. This was because, *inter alia*, material witnesses to the events were not called, and no obvious damage to the company as a consequence of her conduct was proven;

(iv) significantly for the purposes of this appeal, the company raised for the first time in the Industrial Court, in its pleadings, the allegation that the dismissal was justified because the workman was never qualified for her

position from the outset, as her Master's degree was from Newport University in the United States of America, which was an unaccredited university in Malaysia. Further and alternatively, the company also raised for the first time that Jenny's claim to have obtained the Master's degree was false.

[16] It is the ability and appropriateness of the company to seek to justify its decision to dismiss Jenny on 5 February 2015 by raising the two new allegations post-dismissal, and for the first time in the Industrial Court through its pleadings in or around 2016, long after having made the decision to dismiss Jenny, that comprise the subject matter of the instant appeal. Does s. 20 of the Act envisage or permit the Industrial Court to consider matters?

[17] The Industrial Court rejected reinstatement as an appropriate remedy but awarded Jenny compensation instead, in the sum of RM288,000 less any statutory deductions. The company sought to quash the decision of the Industrial Court.

The Decision Of The High Court

[18] The High Court dismissed the company's application for judicial review, holding, amongst others, as follows:

(i) The Industrial Court does not have to consider the submissions about the workman's lack of qualifications as this was not one of the reasons for her dismissal. The court relied on the Federal Court judgment of Raja Azlan Shah CJ (Malaya) in *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 at 136 ("*Goon Kwee Phoy*") where His Highness held that neither the Industrial Court nor the High Court can go into another reason not relied on by the company for the dismissal;

(ii) The High Court also held that there was no procedural impropriety, irrationality or illegality in the decision-making process of the Industrial Court. As such, there was no reason for the High Court to disturb those findings, namely that the domestic inquiry was invalid and that the company failed to establish the charges when the Industrial Court heard the matter afresh in accordance with *Dreamland* (above).

[19] Dissatisfied, the company appealed to the Court of Appeal on the sole ground that the Industrial Court wrongly rejected and failed to consider the evidence on the workman's purported lack of qualifications.

[20] In other words, the appeal was centred solely on the issue of the admission of new or fresh evidence to substantiate the dismissal, which had not been the subject matter of consideration at the point in time when the workman, Jenny was dismissed.

A **The Court Of Appeal**

[21] The Court of Appeal dismissed the appeal holding, amongst others, as follows:

(i) *Goon Kwee Phoy* (above) is not authority for the proposition that the
B employer is bound only by the reasons stated in the letter of dismissal. It agreed with the contention of the company that the employer could adduce matters other than those specified in the letter of termination in order to justify the dismissal, as held in the Industrial Court cases of *Time Magazine Service Sdn Bhd v. Ganesan R S Ramasamy* [1994] 1 ILR
C 114 ("*Time Magazine*"), S*ugunasegari P S Suppiah v. SAP Malaysia Sdn Bhd* [2011] 2 ILR 629 ("*Sugunasegari*"), and most recently in *Raja Nazim Raja Nazuddin v. Padu Corporation* [2019] 2 ILR 388, and others;

(ii) the cases of *Dreamland* (above) and *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2
D MLJ 753 ("*Wong Yuen Hock*"), it held, appear to support the above proposition as these cases held that the failure to convene a domestic inquiry is not fatal to the company's case if it could justify the dismissal at the hearing before the Industrial Court;

(iii) the Industrial Court has the right to inquire into grounds that differed
E from the reasons for the dismissal, which were subsequently raised by the company in its pleadings, to justify the workman's dismissal. In so doing, the Court of Appeal relied on case-law from the Industrial Court such as *Galift (M) Sdn Bhd v. Tay Keng Lock* [1993] 2 ILR 169 ("*Galift*") and *Time Magazine*. These cases in turn, purported to rely on the
F unreported Supreme Court decision in *National Lane Finance Cooperative Society Ltd v. Raman Perumal Thever* ("*National Lane Finance*") as laying down such a proposition. The Court of Appeal did however add the rider that it would be presumptuous to conclude that such a proposition is applicable in every case, as none of the Industrial Court awards or
G court cases which referred to *National Lane Finance* (unreported) had the benefit of the fully reasoned judgment from the Supreme Court;

(iv) the Industrial Court was entitled to consider why the company had raised a new ground for dismissal before the Industrial Court on the grounds that readily accepting such a new ground would defeat the very
H purpose of convening a domestic inquiry, which is designed to give the workman an opportunity to defend himself against specific allegations. It would be open to an employer to reserve other allegations of misconduct, and raise them subsequently and post-dismissal, at the Industrial Court stage, to bolster itself against a possible finding that the
I original charges against the workman were found to be insufficient to justify the dismissal;

(v) the company is not precluded from raising new grounds in its pleadings but the Industrial Court has the discretion whether to consider the new grounds and if it did, the requisite weight to be attached to the same. The Court of Appeal went on to outline the considerations that the Industrial Court could take into account in determining whether to allow the new grounds including the *bona fides* of the new ground and the weight to be accorded to the new ground;

(vi) the Court of Appeal distinguished the two situations where the company gave no reasons at all for dismissing the workman, and where the company gave some reasons for dismissing the workman but only raised new grounds before the Industrial Court. The Court of Appeal held that in the former situation, it could be concluded that the company elected to justify its dismissal of the workman at the Industrial Court. However in the latter situation, the Industrial Court ought to be entitled to satisfy itself as to why the new ground of misconduct was not communicated to the workman earlier.

[22] By its decision, the Court of Appeal has taken a new and definitive position on post-dismissal allegations in dismissal cases under s. 20, which has neither been articulated nor accepted as the applicable position in law under the Act, by the superior appellate courts.

[23] Having set out the law, the Court of Appeal went on to consider the merits of the new ground. It concluded that the allegation was unmeritorious for a variety of well-analysed and articulated reasons.

[24] But that is not the purport of this appeal. As stated at the outset, this appeal turns on whether post-dismissal allegations which were not contemplated by the employer at the time of the dismissal can be brought up for the very first time in the Industrial Court by the company in its pleadings.

[25] Therefore, the details pertaining to the merits of the claim of a false degree and a separate charge of possessing a degree from a university that is not accredited in this jurisdiction are not of relevance to the issues and questions of law before us. Accordingly, we shall not set out the details of the same, nor review the decision of the Court of Appeal in this aspect. Suffice to conclude that the Court of Appeal upheld the Industrial Court's rejection of the company's new allegation.

[26] However, it must be said that the reasoning of the Court of Appeal and its conclusions on the law were completely different from the propositions of law advanced by the Industrial Court and affirmed by the High Court, the latter relying on *Goon Kwee Phoy* (above) and the principles it is so renowned for.

A **The Federal Court**

[27] On 29 September 2020, the company was granted leave to appeal to the Federal Court on the questions of law stated above and reproduced below for convenience:

B (i) Whether the Industrial Court has the right to enquire into reasons subsequently put up by the employer *via* pleading to justify the dismissal, even if such reasons were not given at the time of the dismissal.

(ii) Whether the Federal Court decision in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 is authority for the
C proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination.

Submissions Before Us

The Company's Submissions in Summary

D **[28]** In summary, learned counsel for the company sought to establish that the practice in the Industrial Court is to accept and consider the company's post-dismissal allegations (meaning matters which occurred during the workman's tenure but which were only discovered after the dismissal), in determining whether the workman's dismissal was with just cause or excuse.

E **[29]** Counsel relied on selected cases which supported the position he was propounding, including *Time Magazine* (above), *Galift* (above) which was referred to in *Selva Rani Sinnathamby v. Concorde Hotel Kuala Lumpur* [2014] 3 ILR 658, *Sugunasegari* (above), and *Mohd Muhayadin Rani v. RM Otomobil Sdn Bhd* [2012] 1 ILR 129.

F **[30]** It was however pointed out by this court on the issue of the reliance on selected case-law only, that it was incumbent on counsel to make reference to all relevant case-law and to desist from selecting cases which only supported the company's position, in an effort to persuade this court that the accepted or prevalent practice in the Industrial Court is that the
G tribunal accepts, as a matter of course, post-dismissal grounds at the hearing before it, without question.

[31] Learned counsel for the company further submitted that the decision of the Court of Appeal is contrary to the *ratio decidendi* of the case of *National Land Finance Cooperative Society Ltd v. Raman Perumal Thevar & Anor*
H (unreported) where the Supreme Court held that that the court has the right to enquire into other grounds subsequently advanced by the employer to justify the dismissal.

[32] It was further submitted that the Court of Appeal failed to appreciate
I that the High Court wrongly applied the decision in *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 because the case of *Time Magazine Service Sdn Bhd v. Ganesan R S Ramasamy* [1994] 1 ILR 114

has ruled that *Goon Kwee Phoy* is not authority for the proposition that an employer is bound by the reasons stated in the letter of termination. The appellant contended that since it had pleaded the issue of the respondent's lack of postgraduate qualifications, the court must consider this issue. The appellant argued that it is entrenched in Industrial Court authorities that the court has the right and duty to inquire into subsequent reasons pleaded in the statement in reply.

[33] The company admitted that the workman's lack of postgraduate qualifications was not one of the reasons that led to her dismissal, which was why it was not stated in the letter of dismissal, but as the company subsequently investigated this issue and decided there were merits in that contention, maintained the workman's dismissal was justified as she was not qualified for her position. Secondly, it provided good basis for why she should not be reinstated to her former position. Therefore, her claim must fail.

[34] The company further submitted that the issue of the workman's lack of postgraduate qualifications was fully ventilated at trial, so the Industrial Court erred in failing to consider this pleaded issue, and the courts below failed to appreciate the Industrial Court's error of law.

The Workman's Submissions In Summary

[35] Learned counsel for the workman referred the court to a related aspect of the (unreported) *National Land Finance* case, which was reported in *National Land Finance Co-operative Society Ltd v. Raman s/o Perumal Thevar* [1993] 1 ILR 390, to support a different interpretation of the Supreme Court decision in *National Land Finance* (unreported). That case related to the Industrial Court's determination of the workman's application under s. 33A of the Act, to refer points of law to the High Court. This matter and hearing took place after the Supreme Court adjudicated on *National Land Finance* (unreported), without giving reasons for its reversal of the High Court decision. In dismissing this s. 33A application, the Industrial Court interpreted the Supreme Court decision as follows (at pp. 391-392):

> [2nd column para H] ... since the Supreme Court has overruled the High Court's decision that:
>
> > The reason for termination or dismissal must be given in the notice of dismissal or termination itself, and if not so given, then the termination or dismissal is without reason.
>
> It is implied that even if no reason is given in the notice of termination, the Court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal ...

[36] It was submitted that the decision of the Supreme Court case of *National Land Finance* (unreported) is not applicable to the present case as it is distinguishable on the facts. It was a situation where the company gave no reasons at all for dismissing the workman, as opposed to the fact scenario

here, where the company gave certain specific reasons pursuant to the conduct of a domestic inquiry and then chose to raise a new and disparate ground for dismissal before the Industrial Court. As it was distinguishable, learned counsel submitted that all other Industrial Court case-law relying on *National Land Finance* (unreported) would be similarly inapplicable.

[37] In concluding his submissions, counsel for the workman submitted that question 1 ought to be answered in the negative. As for question 2, if it were to be answered in the negative, it would have dire consequences for all workmen in this country as it would open the floodgates to similar conduct by other employers in firing workmen before finding reasons to justify the dismissals. He also submitted that it would be a violation of natural justice if employers were to be allowed to do so.

Discussion And Analysis

[38] The question of whether or not the Industrial Court is entitled to consider new or fresh reasons accorded by an employer post-dismissal at the hearing before the Industrial Court, in an effort to justify the dismissal, is correctly answered by construing the relevant provisions of the Act to ascertain whether the Industrial Court may do so. Prior to construing the case-law on this subject, the first point of reference must be the specific law enacted by Parliament to provide for a situation of unfair dismissal.

[39] The starting point must be that the right to livelihood is a fundamental right guaranteed under art. 5(1) of the Federal Constitution, see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261. This fundamental right is exemplified by, *inter alia*, s. 20(1) of the Act. It is a statutory provision that cuts across the common law position of master and servant and termination *simpliciter*, which entitles an employer to terminate the services of its employee provided such termination is in accordance with the terms of the employee's contract. *Tan Tek Seng* deals with the employment of civil servants which is given constitutional protection against dismissal pursuant to art. 135 of the Federal Constitution. The contract of employment of private employees is also given protection under the Industrial Relations Act 1967.

[40] To that end, the Act and s. 20 comprise social legislation promulgated by Parliament to ensure that a workman's right to earn a livelihood is not truncated arbitrarily at the will of an employer. Section 20 in particular precludes arbitrary and capricious decisions taken to cease/halt a person's employment, because it is recognised that the right to earn a livelihood is a fundamental liberty and entitlement, that deserves protection. As social legislation, it is incumbent upon this court, when construing its provisions to give the statutory provisions a construction which would assist to achieve the object of the Act. The evolution of industrial law in this jurisdiction and many decisions of this court have emphasised the importance, significance and relevance of having regard to the fact doctrine of social justice. See for

instance, *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 4 CLJ 775; [2021] 2 ILR 177.

[41] Section 20 of the Act provides such protection. Where a "workman" or employee considers that he has been dismissed "without just cause or excuse" by his employer, he may make representations as outlined in the Act, seeking the remedy of reinstatement to his former employment.[1]

[42] Section 20(1) therefore makes it clear that representations ie, a grievance may be lodged, based on the workman's own subjective view that his employment has been terminated without a well-grounded, impartial and reasonable basis. This affords the workman an immediate avenue of redress and access to justice. The remedy is reinstatement, which means that the workman is entitled to return to work, with no loss suffered, where there was no reasoned basis for the dismissal.

[43] The procedure outlined in the section provides for the process of conciliation and if that fails, notification to the Minister of Human Resources who has the discretion to refer the matter to an industrial adjudicatory tribunal, ie, the Industrial Court.

[44] Section 20(3) provides for the representations made by the workman in s. 20(1) to comprise the subject matter of an award of the Industrial Court. The representations made by the workman refer to the complaint of a dismissal without just cause or excuse.

[45] This in turn means that the Industrial Court is required by law to investigate and adjudicate on the representations by the workman of a dismissal without just cause or excuse, concluding in an award. To that extent, the jurisdiction of the Industrial Court, which is an industrial adjudicatory tribunal created by statute, is prescribed and circumscribed by s. 20(3) of the Act. And that jurisdiction is solely to ascertain whether the representations of the workman of dismissal without just cause or excuse, has been made out.

[46] By virtue of the clear statutory content of s. 20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse. Those representations are made by the workman at the time of his dismissal, for reasons which he feels are without any reasoned basis or for reasons that are insufficient to warrant a dismissal. The focus of the enquiry of the Industrial Court under s. 20(3) of the Act, is therefore premised on matters and events as they occurred at the time of the dismissal. The reasons operating in the mind of the employer, which preceded the decision to terminate, and resulted in the decision to terminate, comprise the matters to be considered and adjudicated upon by the Industrial Court under s. 20(3).

[47] By way of elaboration of this point, specific factors, events or reasons would have operated on the employer's mind, prior to the employer deciding to terminate the workman's services. It is those reasons, factors or events which comprise the basis for the dismissal. And the workman makes his representation or complaint of dismissal without just cause or excuse based on those reasons, factors or events only under s. 20(1). It therefore follows that the representations based on those limited reasons, factors or events only, can comprise the basis for assessment and adjudication by the Industrial Court under s. 20(3).

[48] The term "representations" therefore ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of dismissal resulting in the representation.

[49] In a situation where the employer gave no reasons whatsoever for dismissing the workman, the scope of the Industrial Court's adjudication is still tied to the representations and thereby to the factors operating in the mind of the employer at the time of the dismissal. The fact that those reasons have not been articulated does not alter the object and effect of s. 20(1) or 20(3). The Industrial Court is bound to restrict the inquiry to that extent. This issue is considered in further detail below.

[50] There is no provision for the Industrial Court to consider matters outside of the representation by the workman, under s. 20(3). Matters outside of the representation would include matters which were not operative in the employer's mind when the decision to dismiss was taken, but which the employer chooses to put forward post-dismissal at a subsequent stage in the Industrial Court, to justify the decision to dismiss the workman, *ex post facto*. The very specific wording of s. 20 does not prescribe or allow an overarching survey by the Industrial Court of any and all matters both pre and post-dismissal, in an effort to ascertain whether the workman's representations are made out.

[51] In summary, on this point, it is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s. 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman.

[52] A further point which lends weight to the construction above is that the jurisdiction of the Industrial Court is to ascertain whether the dismissal was or without just cause or excuse. It follows that the "just cause or excuse" giving rise to the dismissal, circumscribes the precise area that the Industrial Court is jurisdictionally allowed to examine.

[53] Any such "just cause or excuse" can only refer to the reason resonating in the employer's mind, prior to, or preceding the decision to dismiss. Those words do not envisage the investigation or contemplation of matters or reasons that the employer discovers subsequently or which operate on the employer's mind post-dismissal.

[54] These subsequent matters may well go to the issue of the moulding of the relevant relief such as contributory conduct, or comprise basis to refuse reinstatement and reduce or refuse compensation *in lieu*. But such subsequent and fresh evidence cannot be utilised retrospectively to justify a termination which was not effected for those reasons or on that basis. It is reiterated that this is because such "cause" did not operate on the employer's mind at the material time.

[55] Therefore, both a literal and purposive statutory construction of s. 20 does not envisage the employer seeking to justify the termination utilising post-dismissal reasons.

[56] Equally, it defies a proper construction of s. 20 of the Act, to conclude that an employer dismissing a workman for a particular reason or series of events, can then rely on a wholly different or additional matters, to justify the same dismissal at the Industrial Court, in an effort to bolster or put forward what the employer feels, or may be advised, is a "stronger" defence.

[57] For these reasons, we are of the view that a literal and purposive statutory construction of the provisions of s. 20 clearly support the legal position that the Industrial Court is statutorily circumscribed in its jurisdiction to examine, adjudicate and hand down an award as to whether the dismissal was with or without just cause or excuse premised on matters operating in the mind of the employer at the time of the dismissal. As such the underlying matters relied upon as comprising "just cause or excuse" cannot and do not refer to matters discovered or chosen to be utilised post-dismissal, in order to justify the dismissal at the Industrial Court.

[58] *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 ("*Goon Kwee Phoy*") – the misapprehension of *Goon Kwee Phoy* by the Industrial Court in *Time Magazine Sdn Bhd v. Ganesan R S Ramasamy* [1994] 1 ILR 44 ("*Time Magazine*")

[59] Much was submitted and said on the celebrated case of *Goon Kwee Phoy* (above), a stalwart of industrial adjudication in this country for some forty years now. This is largely because the learned High Court Judge correctly relied on this case to maintain that the Industrial Court was bound to determine whether the dismissal was with or without just cause or excuse premised on the reasons given in the letter of termination, and not rely on matters or reasons given subsequently by the employer post-dismissal.

[60] Learned counsel for the company however relied on this case to maintain that it was authority for the proposition that an employer is entitled to plead and rely on subsequent or new reasons to justify the dismissal of a workman in the Industrial Court, and the Industrial Court is entitled to take into consideration those new subsequent matters in determining whether the dismissal was or without just cause or excuse.

[61] We consider this issue below, as it comprised a substantive part of the basis relied on to support the proposition that subsequently found factors are admissible to justify a dismissal on the part of an employer.

Goon Kwee Phoy

[62] The case of *Goon Kwee Phoy* (above) concerned a workman who lodged a representation of dismissal without just cause or excuse when his services were terminated on the stated grounds of redundancy in his letter of termination. In accordance with his contract of employment, he was given the requisite notice of one month's pay as well as an *ex-gratia* payment of six months' payment as retrenchment benefits.

[63] But his grievance and subsequent representation under s. 20(1) was that there was no actual redundancy. As such, he maintained that the dismissal was without just cause or excuse. In other words, despite compliance with the contractual terms and the payment of retrenchment benefits, he challenged the fact of redundancy and maintained that it was in reality a dismissal without just cause or excuse.

[64] The High Court however, held that there could be no dismissal under s. 20 of the Industrial Relations Act 1967 because there had been complete compliance with the terms of the workman's contract of employment. In other words, the High Court held that where a contract was terminated *simpliciter* and the terms of the contract of service were complied with, it could not amount to a dismissal under s. 20 of the Act.

[65] The Federal Court corrected this error holding, *inter alia*, that a termination *simpliciter* which complied with the terms of the contract of employment, but which was not grounded on any just cause or excuse, could still comprise a dismissal without just cause or excuse enabling the workman to claim reinstatement to his former employment under s. 20 of the Act.

[66] As alluded to earlier in this judgment, the High Court failed to appreciate that the Act cuts through the common law position of master and servant and provides redress for anyone whose livelihood has been affected by a dismissal without sufficient basis or reason. In other words, even if an employer complies with his contractual obligations under a contract of service, a workman is still entitled to make a representation under s. 20, where he is of the view that he was dismissed without just cause or excuse. The legislation in the form of the Act provides protection for the workman's livelihood notwithstanding compliance with the terms of the contract of service.

[67] Therefore the *ratio* of *Goon Kwee Phoy* (above) is the recognition of the foregoing legal principle encapsulated crisply by Raja Azlan Shah then CJ (Malaya) as follows:

> ... We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same ...

There is therefore no difference between a termination *simpliciter* which complies with the terms of a contract of service and a unilateral dismissal for cause. Both enable a workman to lodge representations of a dismissal without just cause or excuse.

[68] After making this fundamental point, it was held:

> ... Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or the dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out .... **The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it**.
>
> (emphasis added)

[69] This portion of the passage restricts the enquiry of the Industrial Court to the reasons given for the action taken by the employer. That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal. This court in *Goon Kwee Phoy* (above) arrived at the same point as we did, in the earlier paragraphs of this judgment, far more pithily, but utilising the same rationale.

[70] This paragraph cannot reasonably be expanded or extrapolated to "squeeze" in the proposition that the Industrial Court may look to reasons other than those advanced by it for the dismissal at the time of the dismissal. In other words, it is not open to the Industrial Court to take into consideration matters or reasons not afforded at the time of the dismissal *albeit* in the letter of termination or orally, but sought to be raised as a fresh basis to justify the dismissal, *ex post facto*.

[71] Subsequent to this all important passage, at the end of the judgment, it was stated that:

> ... We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for *certiorari* we are of the opinion for the reasons given by this court in *Dr Dutt*'s case,

A that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation *in lieu* of reinstatement.

[72] The reference to the company's pleadings in the Industrial Court in this context refers to the fact that the company did not plead by way of reply, B that the dismissal was in fact a termination *simpliciter* which complied with the terms of the workman's contract, and could not therefore comprise a dismissal under s. 20. Notwithstanding this failure to so plead, the High Court in the course of the judicial review proceedings, had seized upon the argument of a termination *simpliciter* to conclude that the termination could C not be challenged under s. 20. This contention, Raja Azlan Shah CJ (as he then was) explained, was flawed.

[73] It is evident from a perusal of this passage that it is not authority for the proposition that the Industrial Court is entitled to inquire into grounds not advanced as the reason for the dismissal at the material time, but sought D to be put forward subsequently during the inquiry at the Industrial Court stage. On the contrary, it contradicts the clear pronouncement by this court in *Goon Kwee Phoy* (above) as emphasised above, where it is clearly stipulated that the inquiry is into the reason advanced by the employer and that neither the Industrial Court nor the High Court can go into another reason or find E one to justify the dismissal.

[74] This addressed the attempt by the High Court in *Goon Kwee Phoy* (above) to "find" a reason to justify the dismissal, namely on the grounds that as it was a termination *simpliciter* where all the terms of the contract had been complied with, it could not amount to a dismissal without just cause or F excuse.

[75] Therefore, the somewhat contrived effort by the company in the instant appeal, to extend the principle enunciated in *Goon Kwee Phoy* (above) to accommodate new reasons raised by way of "pleadings" in the Industrial Court, long after the dismissal and the representations thereto, is an invalid, G unsustainable and flawed reading of this case. We are guided by the wisdom of the case, which explains the intent and rationale of s. 20 and remains as relevant today as it did when it was decided.

[76] *Time Magazine* (above), *Raman a/l Perumal Thever v. National Land Finance Co-operative Society Ltd* (High Court and Supreme Court) ("*National* H *Land Finance*") and *Galift* (above)

[77] However, the Industrial Court in *Time Magazine* (above) took a contradictory view by seeking to read *Goon Kwee Phoy* (above) as it thought fit. The then Industrial Court Chairman Tan Kim Siong (later President) I went through the facts of the case in *Goon Kwee Phoy* (above), and cited the observation of the court to the effect that the "defence" of a lawful termination *simpliciter* had not been pleaded. He then referred to the core of the judgment where it was stipulated that the proper enquiry of the court is

the reason advanced by the employer and that the Industrial Court nor the High Court could not go into a reason not relied upon by the employer nor find a reason to justify the dismissal.

[78] It is at this point that the Chairman deviated completely from the pronouncement in *Goon Kwee Phoy* (above). The Chairman went on to state, that while the passage was understood to be authority for the proposition that an employer was limited to justifying a dismissal for the reasons advanced by him in the letter of termination, this was not, in his own view, what was meant in *Goon Kwee Phoy* (above).

[79] This is what the Chairman said:

> His Lordship Raja Azlan Shah CJ (as he then was) in fact meant that employer is bound by the reason advanced by him **in the pleadings**, and if a particular ground is not pleaded then the court cannot go into it. This is what the Federal Court said:
>
> > We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court ...
> >
> > (emphasis added)

[80] He went on to advance his own reading of the passage to state, quite inexplicably, that what was in fact meant was that an employer is bound by the reasons advanced by it in its pleadings and by implication, not the letter of termination.

[81] By extending the clear stipulation in *Goon Kwee Phoy* (above) that an employer is bound by the reasons advanced by the employer for the dismissal at the time of dismissal, to a subsequent point in time when pleadings were filed in the Industrial Court, the Chairman was effectively allowing the company to utilise reasons discovered subsequently or post-dismissal, to justify the termination.

[82] This is clearly an inexcusable, untenable and less than accurate reading of the clear principle enunciated *Goon Kwee Phoy* (above). To justify this considerable departure from the *ratio* of the case as pronounced by the apex court in para. 5 LHC at p. 136 of the report, the Chairman leapfrogged to an unconnected and disparate paragraph (ie, para. 3 RHC of the same page) to find a basis to support the unwarranted variation he sought to make to the original pronouncement in the case.

[83] Without any proper regard for the doctrine of *stare decisis* and effectively marring the purpose and rationale of s. 20, the Chairman went on to say, with a misplaced sense of authority, as follows:

> In my view I now hold that the case of *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* is not authority for the proposition that the employer is bound only by the reasons stated in the letter of termination.

[84] Apart from this, the Industrial Court, in *Time Magazine* (above) also relied on the unreported decision of the Supreme Court in *National Land Finance* to justify its stance that reasons other than those stipulated in the letter of termination at the time of dismissal, could be introduced subsequently during the Industrial Court inquiry.

[85] In *National Land Finance* at the High Court, it was held that the reason for the dismissal had to be stated in the letter or notice of termination failing which it was a termination without reason. The High Court held:

> The reason for termination or dismissal must be given in the notice of dismissal or termination itself, and if not so given, then the termination or dismissal is without reason.

[86] The Supreme Court overruled the decision of the High Court. However, there are no written grounds. It therefore remains unclear as to precisely what or why the Supreme Court did so.

[87] However, the Industrial Court took this overruling to mean that even where a reason is stipulated in the letter of dismissal, the tribunal has the right to inquire into other grounds subsequently advanced by the company.

[88] This is a clear departure from s. 20 and *Goon Kwee Phoy* (above). The reason being that where a company does give reasons for a dismissal, it is then setting out the operational factors in its mind when the decision to terminate was taken. As the scope of inquiry of the industrial tribunal under s. 20 is whether the dismissal is with or without just cause or excuse, such inquiry must necessarily relate back to the period in time when the events leading up to the dismissal occurred.

[89] The scope of the s. 20 reference does not extend to allowing the employer to justify the dismissal premised on matters which were not operational in its mind when making the decision to terminate. This means that post-dismissal factors which occur to the employer are not available to justify the employer's action.

[90] Reverting to *National Land Finance*, it is clear that in the absence of cogent reasons in writing stipulating a clear departure from *Goon Kwee Phoy* (above), there is no basis to read into the overruling of the High Court decision that it is authority for the proposition that an employer is at liberty under s. 20 to advance reasons subsequently thought of, or ascertained post-dismissal to justify the fact of the dismissal. While some of these matters may go to the issue of moulding the appropriate remedy in each case, particularly in relation to precluding reinstatement or reducing compensation *in lieu* of reinstatement, such matters are precluded from being advanced in support of the primary inquiry into whether the dismissal is with or without just cause or excuse, by the purpose and rationale of s. 20.

The Situation Where No Reasons Are Given

[91] But there are cases where the employer does not give any reasons whatsoever, either in writing or orally. What happens then? Section 20 makes no distinction between a case where the employer gives reasons or does not. As stated at the outset, the representations are lodged by the workman on a subjective basis, ie, he claims that his dismissal is without just cause or excuse and the Industrial Court is then bound to consider the reasons. Where the employer fails to give reasons, the case of *Dreamland* (above) makes it clear that the matter does not end there. It does not mean that the dismissal is without just cause or excuse entitling the workman to reinstatement.

[92] Instead, the Industrial Court embarks on an inquiry itself, allowing the employer to adduce evidence to explain why the dismissal is with just cause or excuse, notwithstanding that it failed to comply with the principles of natural justice by allowing the workman to defend himself against the allegations against him. What this means is that the employer adduces evidence to support its stance that the dismissal was justified. It follows that such evidence must be evidence which was evident and operational in the employer's mind immediately prior to, or at the time of dismissal. It cannot refer to evidence which arose in the employer's mind subsequently because those factors did not make the employer reach the decision that the workman's services ought to be terminated. So the ambit of the Industrial Court's jurisdiction is clear and does not change depending on whether an inquiry was held or otherwise. And the ambit of that jurisdiction is to ascertain the matters or factors determinative of the decision to dismissal, resulting in the dismissal, and not matters which have occurred subsequently to the employer in an effort to justify the dismissal *ex post facto*.

[93] It would give rise to extremely perverse consequences if the latter was indeed the construction to be accorded. It would result in the employer not giving any reasons whatsoever at the time of dismissal and then put forward a series of reasons, some of which occurred to the employer at the time of dismissal and some subsequently in order to justify its decision. It would be the antithesis of the object and purpose of the Act, which, being social legislation was crafted by Parliament to ensure that a workman's livelihood is not terminated arbitrarily or capriciously by an employer, but only with just cause or excuse.

[94] It would also encourage industrial disharmony, as it is completely contrary to the ethos of industrial jurisprudence to encourage employers not to give a workman an opportunity to be heard prior to dismissing them. Again such a construction would be contrary to the purpose and object of the Act under s. 20.

[95] To this extent, the submission by counsel for Jenny in relation to *National Land Finance* (unreported), namely to seek to distinguish the case on the grounds that it dealt with a case where the employer gave no reasons, while in *Goon Kwee Phoy* (above) the situation was different, misses the point. *National Land Finance* (unreported) cannot be authority for such a proposition because there are no grounds on which such a conclusion may be reached. More importantly the High Court in *National Land Finance* simply concluded that as no reasons were given, the dismissal was without just cause or excuse. That too is not a correct approach. In such a case where the employer has chosen not to give any reasons, it still remains incumbent upon the Industrial Court to inquire whether the dismissal was with or without just cause or excuse. But the High Court did not specify that notwithstanding a lack of reasons, it remained the statutory duty of the Industrial Court to inquire into the dismissal. While the Supreme Court did not give written reasons, the fact of no inquiry having been conducted by the Industrial Court would be sufficient reason to overturn the decision of the High Court.

[96] But such a reversal is NOT equivalent to the Supreme Court holding that an employer is at liberty, whether in a case where no reasons were given or some reasons were given, to produce new, disparate and fresh evidence in an attempt to shore up its defence and establish that the dismissal was justified. The decision of the Supreme Court in *National Land Finance* (unreported) does not comprise licence to employers to advance subsequently derived facts and evidence to defend a claim of dismissal without just cause or excuse in the Industrial Court. *Time Magazine* (above), which is the decision of an inferior tribunal cannot be sustained for the reasons set out *in extenso* above. Subsequent evidence is simply not available to be utilised in that fashion under s. 20.

[97] In summary therefore, it is evident that *Time Magazine* (above) is not good law and ought not to be followed. This is a case from the Industrial Court which seeks to re-write the formidable propositions of law enunciated by the apex court of the land in construing s. 20 of the Act. Similarly, the case of *Sugunasegari* (above) where a similar reading of *Goon Kwee Phoy* (above) was adopted is also flawed and incorrect.

[98] The award by the Industrial Court Chairman in the instant appeal is the correct approach to be adopted, as affirmed by the High Court.

[99] The net effect of allowing the industrial tribunals to adopt a reading of their own choice in relation to a s. 20 representation is to undermine the very purpose and rationale of the legislation designed to protect a workman. It gives the employer the opportunity to re-think and add to the original reasons for the dismissal, in an effort to shore up its case. The employer is endowed with the means and capacity to so do, in the long interval between the lodging of a representation and the final hearing in the Industrial Court.

[100] That is not the purpose of the Act which is to give a quick and effective remedy to a workman who requires employment as a means of livelihood. In point of fact, as is well known, the remedy is supposed to be effected within 30 days. However, with the advent of sophisticated litigation in the Industrial Court, the dream of access to justice for a workman has long since become somewhat of a mirage. But what is clear is that the legislation as crafted in s. 20 of the Act cannot be stymied or weakened by unwarranted and invalid extensions to the purpose of s. 20.

[101] It should be pointed out for clarity that when a company chooses not to give any reasons for the dismissal, it does not mean that the matter ends there. The inquiry proceeds in the Industrial Court in much the same way. However, the employer is bound to give reasons operating in its mind at the time of the dismissal, and cannot advance matters which it did not take into consideration at the material time, but chooses to do so subsequent to the dismissal, in an effort to justify the dismissal.

[102] Errors in the decision of the Court of Appeal

(i) The Court of Appeal, with great respect, erred in accepting the interpretation of *Goon Kwee Phoy* (above) as re-interpreted by the industrial tribunals in their awards in *Time Magazine* (above), *Sugunasegari* (above) and most recently in *Raja Nazim Raja Nazuddin v. Padu Corporation* [2019] 2 ILR 388, for the reasons we have enunciated at length above, (see para. 25 of the judgment of the Court of Appeal);

(ii) The Court of Appeal erred in holding that the cases of *Dreamland* (above) and *Wong Yuen Hock* (above) appeared to support the proposition that an employer was at liberty to advance reasons subsequent to the dismissal and not stipulated at the time of dismissal, because these cases are authority for the principle that the failure to convene a domestic inquiry is not fatal to the company's case if it could justify the dismissal at the hearing before the Industrial Court.

[103] In so holding the Court of Appeal, again with respect, conflated two disparate principles of industrial adjudication.

[104] In relation to domestic inquiries, the general principles of good industrial practice and natural justice require that an employer ought to hold a domestic inquiry prior to dismissing a workman for misconduct. However, a failure to hold a domestic inquiry is not fatal. Otherwise an employer who had perfectly just cause or excuse on the substantive merits of a case to dismiss an employee, would be compelled to reinstate or pay compensation to a workman guilty of grave misconduct, simply because it had failed to comply with this procedural requirement. Therefore, the position in law as enunciated in the leading case of *Dreamland* (above) is that where an employer fails to hold an inquiry, or an inquiry is found to be defective, it is open to the employer to establish afresh at the inquiry before the Industrial Court,

A that the dismissal was indeed with just cause or excuse. In other words, the employer is at liberty to establish the basis for the decision to terminate the workman.

[105] As explained earlier, it follows that the basis for termination of the workman is a reference to the matters, events or factors operating in the mind B of the employer when the decision to terminate was taken, and not matters or facts occurring to the employer post-dismissal. *Wong Yuen Hock* (above) affirms this position.

[106] In other words, the employer is accorded a further opportunity to justify the reasons for the dismissal despite not having held an inquiry or by C reason of having held an invalid inquiry. It is not, however, license for the employer to introduce fresh matters and events or occurrences that have subsequently appeared to the employer to provide good basis to justify the dismissal. It remains the position that the reasons advanced in the Industrial Court inquiry should be the reasons operating in the mind of the employer D at or immediately prior to the dismissal. There is therefore no conflict between *Goon Kwee Phoy* (above) and *Dreamland* (above) or *Wong Yuen Hock* (above).

[107] They all support the fundamental proposition that the employer is E entitled to establish just cause or excuse in relation to the dismissal, but such cause or excuse is circumscribed to the material time. That material time is the period relating to and immediately prior to the dismissal. It does not extend to other reasons occurring to the employer subsequently at the Industrial Court inquiry stage. Neither *Dreamland* (above) nor *Wong Yuen Hock* (above) comprise authority for such a proposition. F

[108] As a consequence of the Court of Appeal erroneously accepting that subsequent reasons could be advanced by way of pleadings in the Industrial Court, it then had to deal with how to filter or control the raising of new and additional grounds for the first time in the Industrial Court. As a matter of G law and industrial practice, the advancing of new reasons is not to be entertained, on a rational construction of s. 20. As such, any attempt to devise a test for the Industrial Court to undertake, prior to deciding whether or not to allow new grounds to be raised for the first time by way of reply at the hearing, is similarly misplaced and erroneous. Suffice to say that in view of our clear views outlined above, there is no necessity for the crafting H of any such tests.

[109] But it might well be asked what is the position if the employer discovers, that unknown to it, the workman had been guilty of grave misconduct comprising compelling factors which preclude relief to the I workman? It would be unjust to the employer to expect him to reinstate, for example, a workman guilty of theft or some other serious misconduct, which the employer only discovered after the workman had been dismissed?

[110] It is here that a distinction must be made between the basis for the dismissal and the appropriate remedy to be afforded to a workman. It is well settled from *Goon Kwee Phoy* (above) onwards that the workman's claim of a dismissal without just cause or excuse under s. 20 should be tried on the cause of action, or circumstances apprehending at the time of the dismissal when the representations were made. However, that does not mean that events after institution of the representations cannot be considered at all.

[111] In a case where there are compelling new facts of for example breach of trust or theft, discovered post-dismissal, it is open to the employer to adduce such evidence in relation to the remedy to be afforded to the workman. It would be a formidable basis to counter a claim for reinstatement, and may well be sufficient for the Industrial Court to conclude that no compensation *in lieu* of reinstatement ought to be allowed either. In point of fact, it is the duty of the Industrial Court under s. 30 to consider the subsequent facts and circumstances and mould the relief accordingly. It might conclude that the relief has become inappropriate and determine the correct relief to achieve complete justice between the parties.

[112] While it therefore may go towards the issue of the remedy to be awarded, it does not go to the basis or reason for the dismissal, simply because it was not known at that particular time and could not have operated on the employer's mind. As such, the workman was not dismissed for such misconduct, but for some other reason. That other reason comprises the basis for the workman's representation and it is the representation, as we have explained earlier that circumscribes the Industrial Court's function and obligation under s. 20(3);

[113] The Court of Appeal erred in relying wholly on the inadequately reasoned decisions of an inferior tribunal, the Industrial Court in preference to the clear words of this court in *Goon Kwee Phoy* (above). It also did not give any, or any adequate consideration to, or statutorily interpret the express terms of s. 20 of the Act.

The Questions Of Law

[114] We now turn to the questions of law before us:

> Question 1: Whether the Industrial Court has the right to enquire into reasons subsequently advanced by the employer *via* pleadings at the hearing stage of the inquiry before the Industrial Court, to justify the dismissal, even if such reasons were not the reasons advanced at the time of the dismissal?
>
> Answer: For the reasons we have enunciated at length above, we answer the question in the negative.
>
> Question 2: Whether the Federal Court decision in *Goon Kwee Phoy* is authority for the proposition that the employer is bound only by the reasons of dismissal stated in the letter of termination.

Answer: For the reasons we have stated above, we decline to answer this question.

[115] We would add, as we have explained above that the limitation restriction relates to the reasons provided for the dismissal which relate to events operating in the employer's mind and which gave rise to the decision to dismiss at the material time.

[116] Events occurring after the representations have been lodged, and the representations referred to the Industrial Court for inquiry, may be considered by the Industrial Court in appropriate cases for the purposes of moulding the appropriate relief.

[117] The distinction is between ascertaining just cause or excuse at the time of the dismissal on the one hand, and moulding the appropriate relief when the matter is heard and resolved before the Industrial Court at a subsequent stage.

[118] These are our full reasons for dismissing the company's appeal with costs on 22 June 2021 with costs of RM30,000 to the respondent.

Endnote:

1. Part IV of the Industrial Relations Act 1967 "Representations On Dismissals" provides the procedure for an aggrieved workman in s. 20:

> 20. (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been **dismissed without just cause or excuse** by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (emphasis added)
>
> (1A) [omitted, this s. is on the timeframe to make a representation.]
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under sub-s. (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.

In brief, the process begins when the workman sends a representation to the Director General ("the DG") who will try to get parties to come to an amicable resolution. When the DG is satisfied that the matter is not likely to be settled, he will notify the Minister of Human Resources ("the Minister"). If the Minister thinks fit to do so, he will refer the representation to the Industrial Court.